buildings, laboratories and packaging facilities in close proximity to the storage and processing units. By its nature the plant requires extreme caution and close attention to avoid fires or explosions that could endanger lives and property. The company has been and is particularly aware of these facts and has governed its actions accordingly.

Production and maintenance employees at the plant have for many years been represented by a union, Oil, Chemical and Atomic Workers International Union, AFL-CIO, and its Local Union No. 11-481.

For a number of years prior to (and since) the events here involved, the company and the union entered into written collective bargaining agreements, referred to for convenience as "contracts", covering wages, hours and working conditions of the plant employees represented by the union.

One such contract was dated February 7, 1955. By its terms it continued in effect until February 7, 1956, subject to automatic renewal for yearly periods unless one or the other party gave at least sixty days notice of termination.

The local union gave such notice in late November 1955, and negotiating meetings began December 9, 1955. Seven meetings were held prior to expiration of the contract. The union requested a substantial wage increase and a number of fringe benefits. During the course of these meetings the company made a number of counter-proposals, including a wage increase and some fringe adjustments, but the union considered them insufficient and no agreement was reached.

By January 30 the company had made its final offer, which included a 9¢ wage increase, and the union had

stated its wage increase "pattern" was 15¢ and that it would not take less.

At the January 30 meeting, the last prior to expiration of the contract and the statutory notice period on February 6, the company representative, who was the plant manager and superintendent, stated he needed the security of a signed contract to continue to operate the "vital" or hazardous units of the plant.

The union proposed that the existing contract be extended for ninety days. The company rejected this proposal and proposed that the existing contract be extended for a year. The union rejected this proposal unless the company met the 15¢ demand. The company would not agree to the 15¢ increase.

The union agreed to submit the company's final offer to the local membership, but said it would be rejected because it fell short of the 15¢ pattern.

The company then requested that it be informed of acceptance or rejection by Friday, February 3, saying that unless it knew it had a contract by then it would have to begin shutting down the hazardous units, a process requiring about three days.

The union said it could not have a membership meeting before February 4 because its international representative had business elsewhere. The union representative stated that no strike was "imminent" because no strike vote had been taken, and offered to put this statement in a letter along with the offer of a ninety-day extension.

The plant superintendent said that he was responsible for safety of the plant, that he would not take a chance on a walkout with the plant in full operation, and

that no individual or committee could guarantee there would be no strike at the contract's expiration at midnight, February 6.

On February 4 the union held a membership meeting. The members voted to accept the company's offer by a vote of 56 to 39.

On Sunday, February 5, the local union president telephoned the plant superintendent and told him of the vote, but said it was subject to international union approval. The superintendent asked why, saying this had never happened before. The union president said this was union policy, and that the union officers would not sign the contract.

The company began shutting down the sensitive and hazardous units on the afternoon of February 3. By Monday, February 6, all such units were closed down to a point where the superintendent felt they could be handled safely by supervisors in the event of a sudden strike. Complete shutdown of hazardous units was achieved sometime on February 8. They remained down until May 24.

During the entire period from February 6 to May 24 the office, boiler house, pumping stations and barrelhouse continued to operate full time. No union employees were laid off, but many of them went on a reduced workweek, usually two or three days a week, due to shutdown of the hazardous units.

Between February 6 and May 24, seven additional negotiating meetings were held. After several more meetings, the company and the union finally reached an agreement on terms different than either had insisted upon on January 30.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Which Should Be, Settled By the Supreme Court.

The Court should grant certiorari in this case because the Court of Appeals in this case has attempted to define the limits of the legitimate use of the lockout, relying entirely upon its interpretations of Mr. Justice Brennan's opinion in *Labor Board v. Truck Drivers Union*, 353 U.S. 87 (1957), an important question of federal law expressly reserved and not determined by the Supreme Court in that case.

The Court of Appeals, like the Board, simply assumes that an employer lockout that has as its sole purpose economic pressure to induce a union to accept a contract is presumptively unlawful and a violation of the Act.

Put in another way, and perhaps in language more familiar to employers and employees, the Board and the Court assume that the position "no contract, no work" may not lawfully be maintained by an employer, although it is a recognized and common position of unions.

The problem is somewhat narrower than that of equating lockouts with strikes in general, but it is assuredly a partial application of the proposition that the employer lockout is the corollary of the union's right to strike.

Certainly the decision in *Labor Board v. Truck Drivers, Union*, supra, was not intended to dispose of this question. In that case Mr. Justice Brennan said:

"Nor are we called upon to define the limits of the legitimate use of the lockout. The narrow question to be decided is whether a temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employer's interest in bargaining on a group basis."

(page 93)

The Court in footnote 19 observes:

"We thus find it unnecessary to pass upon the question whether as a general proposition the employer lockout is the corollary of the employees' statutory right to strike."

Notwithstanding these clearly expressed limitations upon the scope of the decision the Court of Appeals would treat the decision as a general directive dispositive of all cases involving a lockout.

Such a treatment of the decision would deprive employers, unions, employees, and the Board, for that matter, of the instruction and guidance that can be supplied only by the Supreme Court's interpretation of the Act in a specific case involving the question.

This is not in any sense a disposition of a factual question, an inference, expert or otherwise, or a balancing of equities in an area reserved to the Board. It is simply an interpretation of the Act in an extremely important respect.

The difficulty with the approach of both the Board and the Court of Appeals to this case is that each adopts without discussion the proposition that the position "no contract, no work" is unlawful when assumed by an employer and then goes on to deal with exceptions that the

Board has applied in many cases in the past, including *Labor Board v. Truck Drivers Union*, supra.

This begs the question reserved by the Supreme Court in the *Truck Drivers* case. If a lockout may lawfully be used to apply economic pressure to obtain an otherwise lawful contract as an incident of collective bargaining, the existence and validity of the exceptions need not be decided. Conversely, if the Board has found that the case comes within one of its exceptions, the broader general question need not be reached.

If all the findings and inferences of the Board in this case are accepted, then this unanswered question of law must be resolved.

This employer was found by the Board to have used a partial shutdown or lockout solely for the purpose of putting pressure on the union to accept a contract offered by the employer. No phase or aspect of the proffered contract was illegal. It took nothing away and proposed no worsened working conditions. It contained substantial concessions, including a 9¢ wage increase, but not as much as the union wanted. It is true that the employer insisted upon a contract for a year rather than ninety days, but that is a typical economic issue, and that proposal was neither unreasonable nor unlawful.

The Board's findings present a simple economic lockout in aid of an otherwise lawful bargaining position. The Board and the Court of Appeals found that no exceptions applied.

Whether or not such a lockout is unlawful is a question of federal law of substantial importance, and

one that has not been, but which must someday be, resolved by the Supreme Court.

It is important as a matter of great practical importance in bargaining, and also because large sums of back pay are involved.

The Board's order directing the petitioner to bargain with the union is of no great concern. As the record shows, this employer bargained with the union for years prior to the lockout, bargained during the lockout, bargained while the Board hearing was going on, and, by way of information, concluded two contracts with the union during the two years the Board was deliberating on whether or not to issue an order to bargain.

The back pay involved, however, amounts to many thousands of dollars, and imposes a heavy burden on this relatively small employer. In other cases involving tens of thousands of employees rather than hundreds, and a full shutdown rather than a partial one, the amounts could become astronomical.

In addition, the decision has a substantial impact on the conduct of bargaining. By simply withholding notice of intention to strike while at the same time refusing any proferred contract, a union can force an employer or an industry, to operate for an indefinite period under daily or weekly threat of a strike that could destroy the enterprise or industry.

An interpretation of the labor law of such magnitude and potential should not be obliquely assumed or culled from dictum. This case fairly presents the question, and only the Supreme Court can finally answer it.

2. The Decision of the Court of Appeals Conflicts With the Decision of Other Courts of Appeal on the Same Subject Matter.

In the earlier stages of this lengthy litigation, the Board majority relied primarily upon two of its prior decisions as authority for its major premise, which was that an employer lockout in aid of his bargaining position is presumptively illegal, (App. p. 24) and that shutting down the hazardous units in this case was not within the exceptions to this premise.

The first case was *American Brake Shoe Company*, 116 NLRB 823. That decision was vacated and set aside in *American Brake Shoe Co. v. NLRB*, 244 F.2d 489, (7th Cir., 1957). The circumstances of that case were remarkably similar to the circumstances here, the principal difference being, as Board members Rodgers observed in his dissent that in *American Brake Shoe* the loss would have been to future business, whereas the loss in the instant case would have been to plant and community property. (App. p. 30)

The second case was *Insurance Agents International Union*, 119 NLRB 768, involving a partial strike and harassing tactics by a union in the course of bargaining. This decision of the Board was vacated and set aside on October 23, 1958 in *Insurance Agents International Union v. NLRB*, 260 F.2d 736 (C.A. Dist. Col.). Certiorari was granted by the Supreme Court on January 26, 1959, 358 U.S. 944.

Presumably the Board majority cited its *Insurance Agents* decision because in the instant case the employer engaged in what the Board considered a partial lockout.

which the Board (inconsistently as it would seem) equated with the partial strike of the insurance agents.

However, the *American Brake Shoe* decision by the Board, had it been enforced by the Court of Appeals, would certainly have supported its decision in the instant case. The difficulty is that the Court of Appeals for the Seventh Circuit reversed the Board in circumstances where the employer had far less compelling reasons than petitioner for curtailing operations.

For some reason the Board did not seek review of the *American Brake Shoe* decision by the Supreme Court.

There is a conflict between the decisions of these Courts of Appeal that should be resolved.

Furthermore, the "balancing of conflicting legitimate interests" in the instant case is far less impressive when analyzed than when simply stated.

The Board held this case for almost two years. It would be unfair to the Board to assume that it was not analyzed and studied for a long time before the decision issued.

After that extended consideration, the decision was reached by the narrowest possible margin, with two of the five members vigorously and unqualifiedly dissenting. This long delay and lack of unanimity suggests that the Board's conclusion as to the proper balancing of interests in this particular case was sufficiently uncertain to justify a more complete judicial review on the merits than would otherwise be called for.

There is a further assumption by the Court of Appeals that is wholly unwarranted. The Board's views on legality of a lockout by non-struck members of an employer association were not the product of the Board's

reasoning, but were the result of a series of cases in which Courts of Appeal corrected the Board's initial efforts in this direction.

The Board in the beginning considered lockouts in aid of bargaining by non-struck members of employers' associations just as unlawful as it now considers lockouts by individual employers.

In *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576 (7th Cir. 1951), the Court of Appeals rejected the Board's holding, saying, among other things, ". . . the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the union, a corollary of the union's right to strike."

This proposition has not been rejected by the Supreme Court, which specifically stated it was not being decided in *Labor Board v. Truck Drivers Union*, supra.

In *Leonard (Davis Furniture Co.) v. NLRB*, 197 F.2d 435 (9th Cir. 1952); 205 F.2d 355 (9th Cir. 1953), the Court of Appeals followed the *Morand* decision, and in its decision following remand to the Board, rejected the Board's conclusion that a lockout for bargaining purposes was unlawful.

It was only after these reversals that the Board in *Buffalo Linen Supply Company*, 109 NLRB 447, made the findings ultimately approved by the Supreme Court.

Nevertheless the Board was not easily persuaded. In *NLRB v. Continental Baking Co.*, 221 F.2d 427 (8th Cir. 1955), the Court again reversed a Board finding that an economic or bargaining lockout was unlawful.

The decision of the Court of Appeals for the Third Circuit conflicts with decisions in the Seventh, Eighth and Ninth Circuits cited above.

In substantial part the decision of the Court of Appeals is based upon a proposition of the Board which it adopted and stated as follows:

> "The lockout before us, in the view of the Board, had unquestionably lessened, if it had not destroyed entirely, future strike impact. Interference with, impeding or diminishing in any way the right to strike is affirmatively forbidden by Section 13 of the Act."

The Board's view, as apparently adopted by the Court, is that any action that tends in any way to diminish the effectiveness of a strike is unlawful as an interference with the right to strike.

This is an extraordinary proposition that should not be permitted to stand without correction. Under it no economic lockout could be lawful, for any lockout necessarily impairs to some extent the effectiveness of a future strike.

Under it the decision in *Labor Board v. Truck Drivers Union*, supra, could not stand, for the lockout by the non-struck members of the employer's association certainly diminished the effectiveness of any future strike, if it did not entirely destroy it.

The decisions in the *American Brake Shoe Co.*, *Leonard (Davis Furniture Co.)* and *Morand Bros. Beverage Co.* cases could not stand, for in each case the lockout substantially lessened the effectiveness of a strike.

The significance of the statement in the Court's opinion is not entirely clear. It could be interpreted as assigning to the Board the function of determining the extent to which the effectiveness of a strike might be impaired by a lockout. However, both the Board and

the Court seem to treat the right to strike as synonymous with the right to win a strike. If that be so, the Board would have no power to overcome the plain directions of Section 13 of the Act.

These evident conflicts concerning the function and authority of the Board in such cases left your petitioner and others interested in the area of collective bargaining in grave doubt as to the correct rule of law.

In the briefs and arguments before the Court of Appeals neither party anticipated the sweeping pronouncements that resulted, and the main premise upon which the decision rests was touched upon only collaterally. Because your petitioner felt that such a broad statement of the law with such a wide-spread impact deserved the fullest consideration on briefs and argument, your petitioner requested rehearing on these grounds, but the petition was denied.

Only the Supreme Court can resolve these conflicts. Such a resolution is in the best interest of all concerned, and should not be withheld.

Respectfully submitted,

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Dated:

APPENDIX

Decision And Order of the National Labor Relations Board

121 NLRB NO. 49 D—234 Emelenton, Pa.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

QUAKER STATE OIL REFINING CORPORATION AND OIL CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO and LOCAL UNION 11-481 THEREOF	Case No. 6-CA-1010

DECISION AND ORDER

On November 14, 1956, Trial Examiner Eugene F. Frey issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.[1]

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no pre-

[1] In addition, the Respondent requested oral argument. The Board hereby denies such request because the record, exceptions and briefs adequately present the issues and positions of the parties.

judicial error was committed.[2] The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the additions and modifications hereinafter indicated.

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[2] The Respondent claims prejudice by reason of certain rulings of the Trial Examiner made with regard to its efforts to litigate the circumstances under which the employees of the Pennzoil Company in Oil City, Pa., engaged in a strike, and the circumstances under which the employees of the Kendall Refining Co. engaged in a strike in 1955.

The record shows that, although the Trial Examiner initially precluded the Respondent from producing the testimony of a witness whom it called to testify concerning the Pennzoil strike, he later reversed this ruling. At this time, the Respondent, however, stated that the witness was not available, but that it would not object to resting on the record as made following the stipulations of counsel to certain facts concerning the Pennzoil strike and the Trial Examiner's statement that "no unfavorable presumptions" against the Respondent would exist by reason of its failure to recall that witness. In the brief to the Board, however, the Respondent asks, in effect, that the record be reopened to give the "respondent full opportunity to develop and present to the Board the true and full facts of the Pennzoil and Kendall strike."

We find nothing in the findings of the Trial Examiner to warrant the position now taken by the Respondent, nor to require reopening of the record as a means of reversing the Examiner's evidentiary rulings. In any event, in reviewing the record herein, we have carefully confined our consideration of the evidence concerning the Pennzoil and Kendall strikes in the light of the Respondent's offer of proof respecting such strikes and its stipulations as above indicated.

1. We agree with the Trial Examiner that the Respondent violated Section 8 (a) (1), (3) and (5) of the Act, by threatening to shutdown, and thereafter shutting down part of its operations during the course of bargaining negotiations for a contract to succeed the then expiring one. Like the Trial Examiner, we find that the Respondent resorted to this action not because of any reasonable fear that the Union would call a sudden strike which would endanger its vital operating units but to force the Union and the Respondent's employees to accept its proposed contract by a given date.

As is more fully set forth in the Intermediate Report, at the January 27-30 bargaining session[3] the Respondent reoffered to the Union the package contract proposal substantially identical in substantive terms to that which the Union and the employees had rejected as unsatisfactory on January 24, and as to which no further discussion had taken place in the interim. At this meeting the Union objected that it was not given an adequate opportunity to express to the Respondent the basis for its dissatisfaction with the contract or to seek some mutually satisfactory compromise. The Union therefore asked for further opportunity to negotiate the disputed contract terms. The Respondent, however, demanded that the contract be immediately resubmitted to the membership as representing its "final" offer, and that the Union advise the Company by February 3 of the membership's decision. It urged hasty action because of its asserted desire to "protect" its vital and potentially dangerous equipment "against the eventuality of strike action" and because of its intention to drain off and to

[3] The January 30 conference was described by the parties to be a "continuation" of the January 27 session.

effect a complete shutdown of such equipment by midnight, February 7.[4] Significantly, the Respondent also made it clear that it would not operate these units without the "security of a contract." In response to the Respondent's demands and in order to allay the Respondent's alleged fears for the safety of its plant and equipment and to pave the way for further negotiations while the plant remained in full operation, the Union offered the Respondent prompt and unequivocal assurances, both orally and in writing, that no strike was imminently contemplated, particularly as none had been authorized under intraunion procedures.[5] The Union also offered to waive its right to strike for 90 days by agreeing to an extension of the then expiring contract for such period.[6]

[4] It appears that the process of shutting down this equipment requires about 72 hours.

[5] Before a strike could be called, union procedures required that notice of a strike vote meeting be posted at least 3 days in advance of such meeting.

[6] Contrary to the assertion in Mr. Jenkins' dissenting opinion, the Union's no-strike assurances were a sufficient guaranty against any sudden strike action by the Union. Indeed, if the Respondent honestly thought that such assurances were inadequate for this purpose, it could have asked for a more explicit guaranty. However, it did not do so and there is no reason to believe from the evidence that the Union would not have granted such a guaranty. Moreover, neither at the hearing, nor in its brief and exceptions filed with the Board did the Respondent contend that the extension of the no-strike clause in its expiring contract, as proposed by the Union, was inadequate because it did not cover all disputes, but only those involving arbitrable grievances. Accordingly, there exists no record basis for finding that the Respondent's refusal to accept the Union's proposal was motivated to any extent by the asserted limited scope of the no-strike clause.

In these circumstances, we agree with the Trial Examiner that the General Counsel established a *prima facie* case that, in threatening, and later completing, the shutdown of the vital operating units, the Respondent did not have reasonable grounds for believing that the Union would engage in a sudden strike which would endanger such units, but actually resorted to such action to force the Union and the employees to abandon their contract demands and accede to the Respondent's.

Notwithstanding the Union's no-strike assurances, the Respondent contends that its conduct was justifiable because it "feared" that the Union sought to prolong negotiations so that it could pick a strategic time to pull a sudden strike. In support of this contention, the Respondent relies upon the nature of the Union's strike-threat strategy during past negotiations with the Respondent; the information which its officials had obtained concerning the occurrence of "quickie" strikes at plants of other employers represented by the same Union and International representative; the fact that the expiration of the 60-day strike notices given by the Union in conformity with the requirements of Section 8(d) coincided with the contract termination date; and the existence of an "impasse" or deadlock in the contract negotiations at that time.

As shown in the Intermediate Report, the evidence pertaining to the Union's past dealings with the Respondent and the Respondent's information concerning the "quickie" strikes at other employers' plants does not impugn the sincerity of the no-strike assurances which the Union gave to the Respondent in the instant negotiations. On the contary, the record establishes that the

strike action taken on those occasions was not in violation of any commitments given by the Union to the affected employers. Moreover, the evidence discloses that, when the Union struck the Respondent in 1950, it did so with responsible regard for the safety of the plant.[7]

Nor was the Respondent justified in shutting down the operating units in question because the Union's right to strike pursuant to its 60-day notice matured on February 8. In the circumstances of this case, we find no reasonable basis for anticipating a sudden strike in

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[7] As the Trial Examiner points out in discussing the 1950 strikes by the Union against the Respondent, the Union refused to give the Respondent assurances it had requested for 72-hour advance notice of actual walkout in a situation in which the membership strike poll had already been consummated. However, although the Union's refusal to give such assurances may properly have warranted the Respondent's decision to shutdown operations in advance of actual strike—a situation not before us here—the fact is that the Union nevertheless agreed to furnish the Respondent with sufficient personnel to maintain its boiler systems and keep the plant safe.

With respect to the "quickie" strike situation at other employer plants, it appears that such strikes, which occurred while a no-strike agreement was in effect, were called without Union authorization. Moreover, in r g offers of proof about these strikes the Respond l not suggest that the Union acted irresponsibly i ese situations or that in fact it had induced the strikes. Finally, the stipulated fact that these unauthorized quickie strikes occurred while a contract was in effect seems to us to reflect on the good faith of the Respondent's claim that its refusal to operate its vital equipment without a consummated contract, despite the Union's no-strike assurances, stemmed solely from considerations of plant safety.

the face of the Union's no-strike assurances. By the same token, we cannot assume that the Union was not honestly desirous of continuing negotiations with the object of reaching an amicable settlement of the disputed terms and conditions of employment, without resorting to strike action. In our opinion, the mere expiration of the statutory 60-day notice to strike does not deprive unions or the employees they represent of their right to use the bargaining table to adjust their differences with their employer or relegate them to economic warfare to secure their demands. Indeed, a contary conclusion would plainly conflict with the express policy of the Act to encourage the peaceful settlement of labor disputes.

Finally, we are not persuaded, as the Respondent contends, that a genuine impasse in negotiations was reached at the time it announced its intention to curtail operations and actually curtailed them, which gave the Respondent cause to believe that further bargaining was futile or reason to apprehend a sudden strike. As indicated previously, at these times, the Union was still insisting on continuing negotiations, offering adequate assurances against a sudden strike. Our appraisal of the entire course of bargaining convinces us that the attitudes of the negotiators had not so hardened as to have rendered further bargaining futile.

The Board has held that, absent special circumstances, an employer may not during bargaining negotiations either threaten to lockout, or lockout his employees in aid of his bargaining position. Such conduct the Board has held presumptively infringes upon the collective bargaining rights of employees in violation

of Section 8 (a) (1) and the lockout, with its consequent layoff, amounts to discrimination within the meaning of Section 8 (a) (3).[8] In addition, the Board has held that such conduct subjects the Union and the employees they represent to unwarranted and illegal pressure and creates an atmosphere in which the free opportunity for negotiation contemplated by Section 8 (a) (5) does not exist.[9] However, the Board has recognized that there are special circumstances where the right of employees to engage in collective bargaining is not absolute but must be balanced against the employer's right to protect his business against loss. Accordingly, it has held that lockouts are permissible to safeguard against unusal operational problems or hazards of economic loss where there is reasonable ground for believing that a strike was threatened or imminent.[10] The burden of going forward with the evidence to justify the lockout rests on the Respondent.

Applying these principles to the present case, we find that the Respondent did not have reasonable grounds for believing that the Union would call a sud-

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[8] *American Brake Shoe Company*, 116 NLRB 820, set aside 244 F. 2d 489 (C. A. 7), finding special circumstances, contrary to the Board's determination.

[9] Id., cf. *Insurance Agents International Union (Prudential Insurance Company)*, 119 NLRB No. 103, where the Board found bad faith bargaining by a union which engaged in unlawful slowdowns during negotiations. In so doing, the Board analogized the Union's conduct to bad faith bargaining by an employer who shut down his plant or cut hours during negotiations.

[10] *American Brake Shoe Company, supra; Betts Cadillac Olds, Inc.*, 96 NLRB 268.

den strike to the detriment of the Respondent's vital operating units, and that by threatening to curtail and actually curtailing its operations with the consequent reduction in the employees' work week, the Respondent coerced employees in the exercise of their bargaining rights in violation of Section 8 (a) (1) of the Act and discriminated against them within the meaning of Section 8 (a) (3) of the Act. We further find that such conduct was the antithesis of good faith bargaining contemplated by Section 8 (a) (5).

2. We agree with the Trial Examiner that the two post-shutdown incidents, additionally encompassed by the complaint, establish that the Respondent attempted to deal individually with its employees and to persuade them to bypass the Union, thereby undermining the Union's exclusive representative status. Such conduct clearly constitutes independent violations of Section 8 (a) (5) and (1) of the Act, and we so hold.[11]

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Quaker State Oil Refining Corporation, Emlenton, Pa., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, and Local 11-481 thereof, as the exclusive rep-

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[11] In addition to the cases cited by the Examiner, cf. *John L. Clemney Company, Inc.*, 118 NLRB 599.

resentative of all production and maintenance employees at the Respondent's Emlenton, Pennsylvania, plant, excluding guards, professional and clerical employees, superintendents, assistant superintendents, foremen, and all other supervisors as defined in the Act, with respect to wages, rates of pay, hours of employment, and other conditions of employment.

(b) Discouraging membership in the above-named labor organization, or any other labor organization of its employees, by discriminatorily locking out, laying off, or reducing the work week of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment, except to the extent permitted in Section 8 (a) (3) of the Act;

(c) Threatening its employees with a partial plant shutdown, lockout, and layoff in order to force them and their bargaining representative to give up their bargaining demands and accept the Respondent's contract proposals without further bargaining;

(d) Offering full employment or other benefits to its employees in order to persuade them to sign a collective bargaining contract, either individually or as a group, with the Respondent, without, in disregard, or contrary to the advice, of their bargaining representative;

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other

concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole all employees listed in Appendix B attached to the Intermediate Report for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(b) Upon request, bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, and Local Union 11-481 thereof, as the exclusive bargaining representative of the employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and compute the amounts of back pay due under the terms of this Order;

(d) Post at its Emlenton, Pennsylvania, plant, copies of the notice attached to the Intermediate Report

as Appendix A.[12] Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by a representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the said Regional Director for the Sixth Region, in writing, within ten (10) days from the date of this Order as to what steps it has taken to comply herewith.

Dated, Washington, D. C.

BOYD LEEDOM, Chairman
STEPHEN S. BEAN, Member
JOHN H. FANNING, Member
National Labor Relations Board

[SEAL]

[12]This notice shall be amended by substituting for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the caption thereof the words "A DECISION AND ORDER". In the event that this Order is enforced by a decree of the United States Court of Appeals, the notice shall be further amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER".

PHILIP RAY RODGERS, Member, dissenting:

For the reasons expressed in my dissenting opinion in *American Brake Shoe Company*, 116 NLRB 820, 838, and adopted by the United States Court of Appeals for the Seventh Circuit,[13] in setting aside the Board's order in that case, I would dismiss the complaint herein. In that case, the Court concluded that there was a reasonable threat of a strike and it was therefore proper for the Company to reduce its output to avoid the imminent probability of a permanent loss of business. In the face of a similar threat of strike, which I would find here, the Court's reasoning should, *a fortiori*— have increased application where the imminent and irreparable loss would be not merely to future business, but rather to plant and community property.

Dated, Washington, D. C.

PHILIP RAY RODGERS, Member
National Labor Relations Board

JOSEPH ALTON JENKINS, Member, dissenting:

I disagree with the majority's disposition of this case. In my view, proper application of the very principles relied upon by the majority requires dismissal of the complaint.

The error of the majority, I feel, stems fundamentally from its failure to assess the Respondent's motivation in the context of the realities of the situation and the circumstances facing the Respondent at the time of the events forming the subject of complaint. Officials of the Respondent testified that they shut down only the

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[13] 244 F. 2d 489.

potentially dangerous operating units in order to protect the economic integrity of its enterprise and to insure the safety of life and property against extraordinary risks which the Respondent otherwise faced in the event of a sudden strike. *It is conceded that the equipment which was shut down, was potentially dangerous and could not be left unattended.* This fact clearly corroborates the testimony of its officials and establishes, as well, the necessity for the precautionary measures taken. *The only equipment that the Respondent actually shut down was the potentially dangerous units.* This fact likewise corroborates the testimony of its officials. The Respondent assured both the Union and the employees contemporaneously with its acts, that its shutdown was motivated solely by protective safety considerations, and was not meant to coerce them into taking a course of action inconsistent with their organizational objectives or bargaining rights. This fact also confirms the Respondent's good faith desire to protect its plant against destruction. And further supporting the lawfulness of the Respondent's conduct is the fact that it did not impair the employment status of its employees; that it did not at any time refuse to recognize the authority of the Union, their bargaining representative; and that it never refused to meet with the Union to discuss the formulation of a contract or to explore the possibility of a solution of their economic differences.

The Respondent's officials also testified that they timed the shutdown, as they did, only because the situation was then ripe for strike action; that, as a result of its past experience with the Union and because of certain suspicious actions of the Union during the course of current negotiations, they feared that the Union re-

quested continued negotiations beyond February 8 under full-operation conditions, only for the purpose of putting the Respondent in a vulnerable position where a sudden strike would either force the Respondent to capitulate to terms they deemed economically unsatisfactory, or to risk irremediable damage to the Respondent's enterprise; and that, for these reasons, they could not and did not regard the no-strike assurances offered by the Union as adequate security against the risks involved.

Upon a fair review of the undisputed objective facts in the record, I am not persuaded, as is the majority, that the Respondent's fear of a sudden strike was unreasonable. Indeed, it appears to me that the measures taken by the Respondent to safeguard its plant was precisely the action that any prudent business man faced with the same situation would have taken. Analysis of the status of negotiations in late January and early February establishes that the time was ripe for a strike. The Respondent had met with the Union in good faith in six long and extensive bargaining sessions prior to January 30. In these sessions it became increasingly clear to the Respondent that, although many of the substantive terms of a future contract were settled, the Union would not consummate any contract in the absence of substantial wage increases over and above those the Respondent deemed to be consistent with its economic interests. The time for lawful exercise of the Union's right to strike, absent agreement, was undeniably on or after February 8,[11] and the stalemate on the issue was such as to warrant expectation of a strike to force acceptance of the Union's demands.

[11] In view of the expiration of the 60-day 8 (d) notice period and the contract term.

So far as the needs of the Respondent in such a situation are concerned, it is clear that the Respondent required at least 72 hours in advance of actual walkout to shut down its potentially dangerous operating units and thus to protect its plant from destruction. The Union was fully aware of this fact. Significantly, in 1950, when negotiations had reached a point similar to that in the instant case, the Respondent specifically requested a 72 hours' notice pledge but the Union refused to give it, preferring instead to stage a walkout and, in one instance at the St. Mary's plant, doing so within 20 minutes after communicating its intent to the Respondent. In the present case, the Union's no-strike offers did not embody a 72-hour notice pledge,[15] nor was the Respondent given positive and unequivocal assurance that it would have such notice before the Union struck. Although the Union offered the Respondent a 90-day extension of the current contract "together with its no-strike provisions", exami-

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[15] It is true that the Union officials advised the Respondent that no strike was imminently contemplated because the membership had not been polled to vote on strike. It is also true that, had the Union followed the custom of posting meeting notices on the plant bulletin board provided for Union use, the Company might thus have obtained the 72 hours' notice it needed to secure the safety of its sensitive equipment against the threat of walkout. It is noted, however, that the Union was under no obligation to the Company to post notices of its meetings; that it did not offer to give the Company an unequivocal pledge, either written or oral, otherwise to provide it with a 3-day notice in advance of a walkout; and that Company officials, who testified as to their reasons for regarding the above Union's no-strike assurances as "inadequate," gave as one of the reasons the failure of the Union to give such an unequivocal pledge.

nation of such no-strike provisions shows that they were qualified in nature.[16]

Other aspects of the Union's conduct during the course of the instant negotiations confirm the Respondent's suspicions of the Union's ulterior motives and created justifiable doubts concerning the genuineness of the assurances offered by the Union's bargaining committee and whether these assurances had the sanction of actual and final authority. A review of the portions of the record setting forth what happened at the negotiations establishes, as the Respondent has variously stated, that the Union appeared to be desirous of delaying negotiations almost from the outset. The record of the December 9 and January 9 conferences shows, for example, that the Union sought postponement of the negotiations on both occasions over the Respondent's objections. Although the Union's request for postponement of negotiations appears to have been bottomed, at least in part, on the fact that the International's wage policy committee had not specifically established the minimum wage basis upon which the Union committee would be permitted to contract, the Union did not give this reason for its postponement request. In these circumstances, the Respond-

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[16] The contract discloses that the "no suspension of work" guarantee extended only to "disputes or differences over the meaning, application or violation of any of the provisions of this agreement or should any local trouble arise" and applied only "until earnest efforts have been made to settle such differences promptly through specified grievance steps." While they obligate the parties to settle, by final and binding arbitration, "any question as to the meaning or interpretation of the provisions of this agreement," they do not require arbitration of other disputes.

ent's unawareness of these considerations might fairly be said to confirm its apprehension of the union's motives for delay, and its belief that the Union's 90-day extension offer at the conclusion of negotiations was only a "renewal" of its earlier delaying tactics.

Other instances of the Union's conduct also support the reasonableness of the Respondent's concern over the Union's dilatory tactics. Thus, while the Union committee, in opposing the Respondent's wage offers, made reference throughout the negotiations to the higher wages paid by the Respondent at other plants, it failed to give any indication, until January 30, that it would be satisfied with a similar wage rate offer. Indeed, it did not even state expressly what increase less than 35¢ per hour would be satisfactory. Further, when the Respondent offered the Union the terms of the St. Mary's contract on January 18, it also advised the Union that the International Representative had accepted it. But the Union failed to find out if this were so, although it was true. It failed to communicate with the International to obtain its views about the offer, while it kept reaffirming its position, first stated on January 18, that the wage terms of the Company's proposal were "below" the International's policy. Finally, when the membership voted, on February 4, to accept the Respondent's proposed contract, to which the Union objected on the ground, among others, that the Company had not acquiesced in the 15¢ wage figure demand made by the Union on January 27 or 30, the Committee refused to execute that contract. This, the Committee was legally privileged to do. However, because such refusal was in fact contrary to the past bargaining procedures which the Respondent believed to be still in effect, the Respondent was also

justified in viewing this refusal with "suspicion," regarding it as a further "delaying" tactic, and concluding that someone other than the barga..ng committee would decide whether and when to strike in support of the Union's demands.

In view of the foregoing, I cannot agree with the majority, that the Respondent did not have reasonable grounds for anticipating a strike which would imperil the safety and security of its plant and the means of livelihood of its employees. On the contrary, the evidence establishes that the Respondent's officials acted as responsible prudent businessmen who took only such measures necessary to avoid destruction of their plant. To hold that the curtailment of operations in these circumstances is illegal would be to deny the Respondent a substantial property right to take all reasonable precautions consistent with its safety needs before it was too la'e. The law is not so narrow-sighted and unwise as to countenance a result, implicit in the majority's opinion, which would make one party to a labor dispute a "sitting duck" for the other party, irrespective of the necessity for curtailing operations.[17]

Accordingly, and as there is no question that the Respondent otherwise bargained in good faith, I would

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[17] In my opinion, no unfair labor practice findings could properly be predicated upon an employer's voluntary curtailment of operations in an industry which, like the instant one, is vulnerable to substantial destruction of its equipment in the event of a sudden strike, with the consequent financial loss to the employer and the impairment of the employees' means of livelihood, unless the labor organization with which it is bargaining gives the employer firm, unequivocal and written assurances against such improvident action.

find, contrary to the majority's decision, that the Respondent's curtailment of operations did not violate Section 8 (a) (1), (3) or (5) of the Act.

There remains for consideration the allegations of the complaint concerning certain conversations between the Respondent's officials and a senior employee and the Respondent's letter which it sent to employees on March 12, all of which occurred after the curtailment of operations. I am not persuaded that these conversations and the letter, when judged in the context of the Respondent's entire course of dealings with the Union, constituted a breach of its statutory obligations or otherwise reflected on its good faith bargaining.

Accordingly, I would dismiss the complaint in its entirety.

Dated, Washington, D. C.

JOSEPH ALTON JENKINS, *Member*
NATIONAL LABOR RELATIONS BOARD

[SEAL]

Opinion of The United States Court of Appeals for The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,707

QUAKER STATE OIL REFINING CORPORATION
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
Respondent.

ON PETITION FOR REVIEW AND SETTING ASIDE ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED AUGUST 7, 1958

Argued March 19, 1959

Before McLAUGHLIN and HASTIE, *Circuit Judges*, and MORRELL, *District Judge*.

OPINION OF THE COURT

(Filed June 15, 1959)

By McLAUGHLIN, *Circuit Judge*.

Petitioner seeks to review and have set aside a final order of the National Labor Relations Board.[1]

The petitioner operates three refineries, one of which is at Emlenton, Pennsylvania. The Oil Chemical and Atomic Workers International Union and its predecessor has long been the certified collective bargaining representative of the Emlenton plant's production and maintenance workers who are members of Local 11-481.

[1] Section 10(f), National Labor Relations Act, 49 Stat. 455 (1935), as amended, 29 U.S.C. § 160(f) (1952).

This case originated when unfair labor pratice charges were made by the union against the company; they were a consequence of the partial shut-down of the Emlenton refinery on February 7, 1956, the day after a collective bargaining agreement had expired. Negotiations had been in progress for some time but agreement had not yet been reached on a new contract. It was the union's position, through the General Counsel of the Board, that the shut-down coerced the employees in the exercise of their collective bargaining rights, discriminated against the employees so as to discourage union membership, and amounted to a refusel to bargain collectively, all in violation of Sections 8(a) (1), (3) and (5) of the Act.[2] The company, however, has consistently maintained that the shut-down was dictated by considerations of plant and personnel safety because it required 72 hours in which to close down elements of the refinery which were dangerous or which could be expensively damaged by freezing if not attended by an adequate work force. After expiration of the contract containing a no-strike clause and without a new one the company felt itself vulnerable to a sudden strike. Additionally, the company asserts that even if the shut-down were not motivated for safety reasons, it was an economic weapon legitimately available to it as a counterfoil to the union's strike weapon. In short, it is the company's position that "No contract, no work" is as applicable to employees by an employer as it is by employees to their employer.

After much testimony, followed by a lengthy and exhaustive analysis of the facts and the inferences reasonably to be drawn therefrom, the trial examiner found

[2] 29 U.S.C. Sections 158(a) (1), (3) and (5).

as a fact that the company had effected the shut-down in order to induce the union to sign the contract the company wished and that the shut-down was not motivated by fear for the safety of the plant and personnel. The Labor Board narrowly made the same finding with three of the five members holding that the company "* * * did not have reasonable grounds for believing that the union would call a sudden strike to the detriment of the Respondent's vital operating units * * *."

"The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."[3] We have concluded without the so often attendant difficulty that the Board's finding is supported by a marked preponderance of the evidence in the record. On January 30, 1956 the bargaining situation was that the company stood on its January 18th offer even though the local membership had voted on January 24th to reject it; a substantially similar contract, however, had been accepted by the local and signed by the union at the company's St. Mary's plant.[4] The union, on the other hand, insisted

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[3] From § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). See, in interpretation thereof, Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) and N.L.R.B. v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951); Jaffe, Judicial Review: "Substantial Evidence on the Whole Record", 64 Harv.L.R. 1233 (1951). And also Gray v. Powell, 314 U.S. 402, 413 (1941) Sperry Gyroscope Co. v. N.L.R.B., 129 F.2d 922 (2 Cir. 1942).

[4] The St. Mary's representative of the international consequently very nearly lost his job for committing the union to a contract which afforded less than the minimum 15 cents an hour increase sought by it. Of course this was not known to Quaker State during the Emlenton bargaining proceedings.

that it would not and could not accept an increase of less than 15 cents an hour.[5] This made a strike a possibility after February 6th and, as is not controverted, a sudden strike which took all employees promptly off the plant's premises could have been disastrous.

But a strike was not the only means by which the parties could be moved from their positions. The union's bargaining representatives had agreed to resubmit the company's proposal to the local membership; it could be anticipated that resistance of the party which lost this vote would soften. No one could justifiably have thought the possibilities of bargaining had been more than temporarily exhausted. There was nothing pointing to the union wanting to strike; indications were consistently to the contrary. The union had offered as early as January 9th to extend the expiring contract until April. When on January 30th the company representatives asserted that the critical elements of the plant must be closed down if the strike security afforded by a signed contract were not available, the union orally suggested a ninety day extension of the old contract with assurance that there would be no strike. The offer and assurances were put in writing by a letter the next day.

Though the company could legitimately choose to be intransigent, thereby creating a risk of momentary change in the union attitude, it was aware both from past experience and from the discussion on January 30th, that by union rules there had to be a meeting of the local for the taking of a strike vote with three days

[5] The union felt that the 15 cents an hour increase granted by Standard Oil to its Bayway refinery workers set the pattern for the industry.

notice of such a meeting. There had been neither vote nor notices. Furthermore, the company had little or no reason to doubt the effectiveness of the assurances given by the union negotiators. It had dealt with Russell in his capacity as president of the local for eight years and as a member of the bargaining committee for even longer. It had no reason to believe that he did not exert considerable influence with his fellow union members. Prorok, the representative of the international union, had also demonstrated by his actions in the 1954 Pennzoil wild-cat strike that both he and the union he represented were dependable.[6]

Further evidence that the union was responsible and reasonable accrued from its history as bargaining representative for the company's employees. Never in those thirteen years had there been a sudden strike unauthorized by union procedures. And always when the union had desired to have available the right to strike suddenly, the company had been on prior notice by the strike vote and the preceding amenities. In other years the union, even when refusing to give 72 hours notice of the timing of the strike on top of such notice had guaranteed a safe and orderly shut-down. During the bargaining proceedings from which this dispute developed the company never even bothered to ask for that sort of guarantee.

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[6] Parks, the plant manager, in rejecting the representations of the union negotiators that there would be no strike, had referred to the Pennzoil strike. Prorok explained that the strike was not authorized by the union and was one in which the union had fully cooperated with the affected company to protect property and settle the grievance. It was obvious that even a no-strike clause in an existing contract would not of itself prevent such a strike.

When sudden strikes had been resorted to in the past either at Quaker plants or those of its competitors the union had always cooperated in the shut-down of the critical units. Such cooperation was in the self-interest of the employees who were, by the nature of their jobs, safety conscious.

In assessing the substantiality of the evidence we have been at pains to consider only those matters relevant to the company decision to shut down as it was formulated up to February 3rd when the shut-down began; to apply hindsight in the light of what later occurred would not be a true assessment of the company's motives. Yet the actual events later transpiring also tend to bolster the Board's finding of fact.

The local membership on February 4th voted to accept the company offer of a 9 cents an hour increase. This placed the union negotiators in the uncomfortable position of having to choose between the local's mandate and the international's expressed policy, since they were without authority to bind the international to anything less than a 15 cents an hour increase. The difficulty was presented to the international, which in mid-February refused, as was its prerogative under the union constitution, to approve the contract and recommended continuation of negotiations. In the meantime and thereafter sentiment developed among some of the members of the local for pressuring their bargaining representatives into signing the contract; this was aided and abetted to some extent by the company's president, who at first indicated he would re-activate the closed-down units if he were furnished a copy of the minutes of the vote accepting the company's offer. After the minutes were transmitted to him he claimed, at first, that he would require signa-

tures of a majority of the employees, and later, of practically all the employees to a petition indicating acceptance of the contract in order to re-activate the plant without fear of a strike. The plant manager meanwhile took somewhat inconsistent positions in the renewed bargaining sessions to the effect that the company already had a contract but would need a signed contract as strike security before going back to full-time operation. All this time it was plainer than it had ever been before the February 4th vote that the rank and file were not minded to strike and that there could be no sound fear concerning plant safety if the plant were kept in full operation.

The state of the record makes it obligatory upon us to affirm the Labor Board's finding of facts.

So we arrive at the area of petitioner's partial economic lockout. But, as we see it, even if the vital element of continuing bargaining negotiations was not here present, this is not off somewhere by itself—an isolated area. It must be dealt with as an integral part of the particular existing labor management situation. It is for this reason that there can be no flat, all inclusive pronouncement that an economic lockout is either forbidden or allowed under the Labor Management Act of 1947.

The Board based its decision on the following principles: "* * * that, absent special circumstances, an employer may not during bargaining negotiations either threaten to lock out or lock out his employees in aid of his bargaining position. Such conduct the Board has held presumptively infringes upon the collective bargaining rights of employees in violation of Section 8 (a) (1) and the lockout, with its consequent layoff, amounts to discrimination with the meaning of Section 8 (a) (3). In

addition, the Board has held that such conduct subjects the Union and the employees they represent to unwarranted and illegal pressure and creates an atmosphere in which the free opportunity for negotiation contemplated by Section 8 (a) (5) does not exist."

It then held: "Applying these principles to the present case, we find that the Respondent did not have reasonable grounds for believing that the Union would call a sudden strike to the detriment of the Respondent's vital operating units, and that by threatening to curtail and actually curtailing its operations with the consequent reduction in the employees' work week, the Respondent coerced employees in the exercise of their bargaining rights in violation of Section 8 (a) (1) of the Act and discriminated against them within the meaning of Section 8 (a) (3) of the Act. We further find that such conduct was the antithesis of good faith bargaining contemplated by Section 8 (a) (5)."

Petitioner places great emphasis on the lack of an express barring of notice to take strike or lockout action by Section 8 (a) (4) though it does directly prohibit strikes or lockouts during negotiations themselves. It urges that since a lawful strike does not justify refusal to negotiate, the same sort of reasoning should apply to an economic lockout during negotiations. It asserts that there is no longer an employer advantage in bargaining power rather that "Now a large and powerful union possesses more bargaining power than most, if not all, of the separate employers with whom it deals."

Whatever confusion may have existed on the subject has, we think, now been eliminated by the Supreme Court in *Labor Board v. Truck Drivers Union*, 353 U.S. 87 (1957). There, we are firmly advised by the Court

through Mr. Justice Brennan that under the Taft-Hartley Act "* * * there are circumstances in which employers may lawfully resort to the lockout as an economic weapon."[7] The opinion cites instances and then decides the actual narrow issue before it. The Court said generally, "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. * * * The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

As to the particular problem in the Truck Drivers litigation the Court said at page 97:

> "The Court of Appeals recognized that the National Labor Relations Board has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown. The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship. We hold that in the circumstances of this case the Board correctly balanced the conflicting

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[7] See also Insurance Agents' Int. Union v. N.L.R.B., 260 F.2d 736 (D. C. Cir. 1958), cert. granted January 26, 1959; American Brake Shoe Co. v. N.L.R.B., 244 F.2d 489 (7 Cir. 1957); Leonard (Davis Furniture Co.) v. N.L.R.B., 197 F.2d 435, 438-442 (9 Cir. 1952); 205 F.2d 355 (9 Cir. 1953); Morand Bros. Beverage Co. v. N.L.R.B., 190 F.2d 576 (7 Cir. 1951).

interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful."

What the Labor Board did in this matter was to obey conscientiously the Supreme Court directive. Following the settled doctrine that the Act permits a lockout in some circumstances, it closely and competently examined the facts. It found that on January 30, 1956 both sides were still negotiating in good faith; that there was no strike; that there was written assurance of no threat of strike; that there was a restatement of a previous offer to extend the bargaining agreement for a ninety day period "while negotiations for a mutually agreeable contract are concluded"; that it was directly thereafter that petitioner closed down its plant.

In the special circumstances confronting it the Board considered that petitioner had used its lockout as an offensive weapon to better its bargaining position and as a result had distorted the bargaining process to a degree where it obtained an unfair bargaining advantage. The lockout before us, in the view of the Board, had unquestionably lessened, if it had not destroyed entirely, future strike impact. Interference with, impeding or diminishing in any way the right to strike is affirmatively forbidden by Section 13 of the Act. 29 U.S.C.A., Section 163, p. 423.

Petitioner argues that the element of continuance of negotiations amounts to nothing as an employer could deliberately assume an inflexible position at the negotiations, bring them to an impasse and thus clear away the objection to his calling a lockout while negotiations were proceeding. The immediate answer to that is, should

a break off in bargaining be found by the Board to be a contrived thing by an employer, the resultant lockout would hardly obtain its approval.

The Board suggests that, in addition, an employer has other means to protect his status against the employees' single maneuver, i.e., a strike. For example, the employer can fill the places of the strikers[8] and he can, on his own initiative, institute the changes in employment terms he had urged in good faith at the unsuccessful negotiations.[9]

Whether we would agree with the reasoning of the Board or not is unimportant. What is all important is the fact that the Board has courageously and ably recognized its responsibility in this extremely sensitive field. It has fully realized that each shut-down case must be decided on its own facts. We think that it has properly performed its difficult assigned task. We are satisfied that it acted according to law in balancing the conflicting interests and deciding that the economic lockout in this instance was unjustified and in violation of the Act. We refuse to disturb what we think has been the exercise of a wise discretion by the Board.

There remains for disposal, the Board's conclusion that petitioner further violated Section 8 (a) (5) and (1) of the Act by attempting to circumvent the union and deal directly with the employees.

While we referred to this collaterally in our preliminary statement, of necessity we must examine in

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[8] N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938).

[9] N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

some detail the evidence in support of the Board's conclusion. It appears that the petitioner, commencing on February 8, 1959, attempted to obtain a working arrangement direct with the local union and by-pass the Oil Workers International Union, the bargaining agent. On that date it sent a letter to its employees describing its version of the actions of the International's representatives, On February 10th, petitioner's president gave to D. S. Konkle, Sr., a company employee, a prepared motion to read at a special employees' meeting. The motion proposed that a copy of the resolution of February 4th, accepting the new contract be signed by the secretary and sent to Hunter, the president of petitioner. As an alternative, in the event that plan failed, Hunter also gave Konkle petitions to be signed by sixty to seventy per cent of the employees, accepting a new contract as outlined in petitioner's letter of February 2nd, to the employees. The personnel supervisor, Newton, also prepared an instruction sheet for Konkle outlining the various steps he was to take. Konkle did attend the meeting and advised it that Hunter would reopen the plant if he were given a certified copy of the minutes which showed that the employees had accepted the company proposal. This was done but Hunter said the minutes were not adequate as they merely reflected the tally. He told Dotterer, another employee, that if he could get nearly one hundred per cent of the employees to sign the petitions this would be acceptable. Dotterer said this was impossible.

Petitioner had no further direct dealings with the employees until March 12th when it sent a letter to the employees offering them a higher wage increase than it had previously named in its negotiations with the union.

It urged the employees to sign a contract without the permission of their bargaining representative, the International.

The Company characterizes its conduct as trying to help the employees who signed the petitions to get the contract signed. It excuses its letter by saying that it endeavored to have the employees first try to have the International Union sign the agreement and if they could not accomplish this, to have the local union officials sign it.

There is sufficient in the proofs to substantiate the charge. It is clearly the duty of the employer under Section 8 (a) (5) (1) of the Act to bargain collectively with the chosen representative of the employees exclusively. *Medo Photo Corp. v. N.L.R.B.*, 321 U.S. 678, 683-684 (1944). The Board considered the company's representations that its only purpose was to dispose of the wage dispute and thus avoid any reason to strike. It refused to accept them because, since the employees had not repudiated their representative, differences with the latter must be handled intraunion not through the employer. While the relationship of the local union with its bargaining representative was not satisfactory, the company had no right to interfere with it as it did. In so doing it violated the Act.

The Board may submit a proposed decree for the enforcement of its order.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Petition for Rehearing

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Quaker State Oil Refining Corporation, petitioner in the above-captioned case, respectfully requests a rehearing of the above-captioned case upon the following grounds:

1. The decision in this case is in substantial part based upon your Honorable Court's interpretation of the pronouncements of the Supreme Court in *Labor Board v. Truck Drivers Union*, 353 U. S. 87 (1957) with respect to the extent of the responsibility and authority of the Board to determine when an economic lockout is lawful and when it is unlawful, and of judicial review thereof.

2. While this question was undoubtedly suggested by the briefs and arguments, it was at most touched upon only in passing. Under the decision it becomes a question of controlling importance, and one of major interest in the field of labor relations. It should, therefore, be thoroughly briefed and argued.

3. Petitioner reserves each of the several points raised in its briefs and arguments in the event it should decide to make application to the Supreme Court for a writ of certiorari, but urges that an opportunity be granted to fully brief and argue the extent of the Board's responsibility and authority to determine the legality of an economic lockout and the legal questions, including presumption of guilt, power to determine bargaining advantages and the like, necessarily presented thereby.

4. In view of the major importance of this question and its potential impact upon industrial relations, we respectfully request that the argument be heard by the entire Court sitting en banc.

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Certificate

The undersigned counsel for petitioner hereby certify that the foregoing petition is presented in good faith and not for delay.

JOHN C. BANE, JR.
JOHN G. WAYMAN
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

QUAKER STATE OIL REFINING CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 12,707

Decree

Before: McLaughlin and Hastie, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on August 7, 1958. The Court heard argument of respective counsel on March 19, 1959, and has considered the briefs and transcript of record filed in this cause. On June 15, 1959, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Quaker State Oil Refining Corporation, its officers, agents, successors, and assigns, abide by and perform the direction of the Board in said order contained.

BY THE COURT

DATED: August 4, 1959

Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 12,707

QUAKER STATE OIL REFINING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUR PETITION FOR REHEARING

Present: McLAUGHLIN and HASTIE, Circuit Judges, and MORRILL, District Judge.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

BY THE COURT

McLAUGHLIN
Circuit Judge

Dated:
August 25, 1959

FILE COPY

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JAMES R. BROWNING, Clerk

No. 498

In the Supreme Court of the United States

OCTOBER TERM, 1959

QUAKER STATE OIL REFINING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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CITATIONS

Cases:

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National Labor Relations Board v. *Truck Drivers Union*, 353 U.S. 87 ..... 8, 9, 10

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 7 12

Section 8(a)(1) 2, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 38–50) is not yet officially reported. The findings of fact, conclusions of law, and order of the Board (P.A. 1008a) [1] are reported at 121 NLRB 334.

JURISDICTION

The decree of the court below (Pet. 53) was entered on August 4, 1959, and petitioner's petition for rehearing was denied on August 25, 1959 (Pet. 54).

[1] "P.A." refers to those portions of the record printed as an appendix to petitioner's brief in the court of appeals; "B.A." to those portions printed as an appendix to the Board's brief.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that petitioner's action in partially shutting down its operations in order to force an agreement on its own terms, infringed employee rights in violation of Section 8(a) (1) and (3) of the National Labor Relations Act, and impaired the bargaining process in violation of Section 8(a)(5).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 3–5 of the petition, and in the Appendix, *infra*, p. 12.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On November 26, 1955, the Union (Oil, Chemical and Atomic Workers International Union, AFL–CIO, and its Local 11–481), the certified bargaining representative of petitioner's employees at its Emlenton plant, notified petitioner, pursuant to Section 8(d)(1) of the Act, of its desire to terminate the existing agreement, which would otherwise have automatically renewed itself on February 7, 1956 (P.A. 937a; 11a–12a). From December 9 to January 30, the parties met several times for the purpose of negotiating a new contract without success (P.A. 938a–940a). When they met again on January 30, plant manager Parks

restated the Company's offer of a four-cent an hour wage increase which had previously been rejected by the employees. Parks requested that the proposal be resubmitted to the employees and that he be advised of their decision by 1:00 p.m. Saturday, February 3. He added that, unless the offer were accepted by then, the Company would have to start shutting down the sensitive units in the plant, because, without a signed contract to replace the old one expiring on February 7, there would be the risk of a sudden strike (P.A. 941a–945a).

The Union negotiators indicated that the Company's proposal would probably be rejected by the International because it was well below the fifteen-cent standard set by the International's Wage Policy Committee. They counter-proposed an extension of the existing agreement for ninety days, which would permit further negotiations to proceed under the security of its "no strike" provision. Moreover, the International representative and the Local president gave their personal guarantee that there would be no strike when the existing contract expired, and offered to put in writing the proposal to extend such agreement for ninety days without the right to strike (P.A. 942a; 666a–667a). On January 31, the day following this meeting, the Union representatives followed up their oral assurances that there would be no strike with a letter so stating and offering to extend the existing contract, with its no-strike clause, for ninety days (P.A. 922a–923a).

Nevertheless, about 1:00 p.m. on February 3, the Company started to shut down the sensitive units in

its refinery. The shutdown was finally completed on February 8, when the Company gradually began to put production and maintenance employees on a reduced work-week. By the week of February 13, approximately 137 employees were on a reduced work schedule, most of them working only two days a week (P.A. 946a; 51a–52a). The shutdown continued until May 24, 1956 (P.A. 947a; 99a).

Meanwhile, on February 4, the Union submitted the Company's offer to its members, and they voted (56 to 39) to accept it, subject to approval by the International. The next day, Local president Russell so advised Parks. Parks asked whether the local negotiating committee would sign the contract, and Russell replied that it could not without International approval. He assured Parks, however, that there would be no strike in the interim, because the employees, though not satisfied, did not intend to "fight" any further (P.A. 948a; 54a–55a).

Russell then mailed copies of the Company's proposed contract to International president Knight in Denver (P.A. 55a–57a). While the matter was pending before Knight, the Company on February 8 sent a letter to the employees describing as "unfortunate" the fact that final acceptance of the Company's offer was left in the hands of the International (B.A. 36b–37b). And, on February 10, petitioner's president Hunter called Donald Konkle, a rank and file employee, to his office, and told him that, if he could obtain a copy of the minutes of the February 4 meeting at which the Company's offer was accepted, he (Hunter) would consider that a contract for

purposes of reopening the plant. To aid Konkle in accomplishing this, Hunter prepared a motion for him to read at an employees' meeting proposing that a copy of the resolution accepting the new contract be signed by the secretary of the Union and delivered to Hunter (P.A. 951a–952a; 308a–310a, B.A. 46b). In the alternative, Hunter suggested that Konkle should procure the signatures of sixty to seventy percent of the employees to a petition prepared by Hunter, stating that they had accepted the Company's contract (P.A. 951a; 308a–310a, 529a, 530a, B.A. 47b). Pursuant to Konkle's efforts a certified copy of the minutes of the February 4 meeting was furnished to Hunter on February 13, but the plant still did not resume normal operations (P.A. 953a–954a; 68a, 632a).

On February 16, International president Knight rejected the Company proposal on the ground that the wage offer was below the pattern for the oil industry established by the Wage Policy Committee (B.A. 34b–35b). When the parties resumed bargaining on February 22, the Union lowered its wage request to thirteen cents, which proposal the Company rejected (P.A. 955a; 76a).

At the next meeting, on February 26, the Union, learning that the Company had just given a ten-cent increase at another plant, asked why this amount was not being offered at Emlenton. The Company replied that ten cents was "available" but not being offered (P.A. 955a; 79a, 401a–402a). On March 12, however, the Company, without consulting or notifying the Union, sent a letter to the employees stating that

its offer was raised to ten cents, and urging that this offer be accepted "without the permission of the International" (B.A. 42b).

When the parties met again on April 2, the Union alluded to this letter and asked the Company if it were making a ten-cent offer. The Company replied that it was not offering ten cents, but again stated that it was "available" (P.A. 80a–81a). Later in April and in May, several further meetings were held, and the parties were finally able to agree upon wages and certain fringe benefits. Although differences still remained over such matters as seniority, length of contract, effective date, and scope of wage-reopener clauses (P.A. 958a; 690a–691a), the parties did not foreclose further bargaining on these points, scheduling another bargaining session for July 19, after the close of the Board hearing (P.A. 958a; 769a).

Meanwhile, on May 24, petitioner reopened the operating units (P.A. 947a; 99a) and resumed full-work weeks, as the result of the filing of a decertification petition with the Board by some of petitioner's employees (P.A. 989a–990a; 699a). It was the judgment of Company president Hunter that, in these circumstances, there would be no danger of a work stoppage, even though there was still no agreement (B.A. 44b).

B. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board (with two members dissenting) found that petitioner did not have reasonable grounds for believing that the Union would engage in a sudden strike which would endanger its

facilities, and that its threat to curtail and subsequent curtailment of production operations occurred before an impasse in the bargaining had been reached. It further found that such "lockout" was motivated by a desire to force the Union and the employees to abandon their contract demands and accede to those of petitioner. The Board concluded that the "lockout," in these circumstances, was violative of the employees' rights to organize and bargain collectively under Section 8(a)(1), (3), and (5) of the Act (P.A. 1013a–1014a). The Board also found that petitioner violated Section 8(a) (1) and (5) of the Act by its efforts—through employee Konkle and the March 12 letter—to effect a collective bargaining agreement directly with the employees, thereby undermining the Union's exclusive representative status (P.A. 1015a).

The Board's order required petitioner to cease and desist from engaging in the unfair labor practices found. Affirmatively the order required petitioner to make whole those employees who suffered economic loss as a result of the unfair labor practice conduct, to bargain with the Union upon request, and to post appropriate notices (P.A. 1016a–1019a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals concluded that the Board's findings that the Company had shut down operations, not because a strike was imminent and it feared for the safety of the plant, but in order to induce the Union to sign the contract it desired, were "supported by a marked preponderance of the evidence in the

record" (Pet. 40). Turning to the question of whether such a lockout is barred by the Act, the court concluded, in agreement with the Board, "that there can be no flat, all inclusive pronouncement;" "each shut-down case must be decided on its own facts" (Pet. 44, 48). In the "special circumstances" of this case, the court held that the Board properly concluded "that petitioner had used its lockout as an offensive weapon to better its bargaining position and as a result had distorted the bargaining process to a degree where it obtained an unfair bargaining advantage," and had substantially impaired the right to strike (Pet. 47). And finally, the court concluded that substantial evidence supported the Board's conclusion that petitioner had further violated the Act by its efforts to circumvent the Union and deal directly with the employees (Pet. 48).[2]

ARGUMENT

In *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 92–93, this Court declared that while "there are circumstances in which employers may lawfully resort to the lockout as an economic weapon," the resolution of that question turns upon "the balancing of the conflicting legitimate interests" in the context of a particular case. "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (*id.* at 96). Weighing the competing factors in that

[2] This conclusion of the Board, affirmed by the court of appeals, is not challenged, or even mentioned, by petitioner.

frame of reference, the Board found that petitioner's resort to a lockout impeded the free functioning of the collective bargaining process and seriously impaired the employees' statutory rights. Accordingly, the Board concluded, and the court below agreed, that the lockout was violative of the Act. We believe that the balance thus struck represents a permissible "exercise of Board discretion * * * in the circumstances of this case" (*Truck Drivers, supra,* 353 U.S. at 97), and raises no general question warranting further review by this Court.

The record in the instant case shows that the lockout was not necessary, as petitioner asserted, to guard against a sudden strike which might have caused serious damage to the plant equipment. As the Board found, petitioner had no reasonable basis for anticipating such a strike; accordingly, the possible damage that might ensue from such a strike could provide no justification for the lockout.[3] Nor was the lockout necessary to protect petitioner's interest in the bargaining negotiations with the Union. The situation which prevailed shortly before the lockout, as the court below described it, was (Pet. 47):

> * * * that on January 30, 1956 both sides were still negotiating in good faith; that there was no strike; that there was written assurance of no threat of strike; that there was a restatement

[3] The Board has held that a temporary shutdown or lockout may be warranted when necessary to safeguard against unusual economic hardships or operational conditions. *Betts Cadillac Olds, Inc.*, 96 NLRB 268; *International Shoe Co.*, 93 NLRB 907; *Duluth Bottling Ass'n*, 48 NLRB 1335. See also *American Brake Shoe Co.* v. *National Labor Relations Board*, 244 F. 2d 489, 492–494 (C.A. 7).

> of a previous offer [by the Union] to extend the bargaining agreement for a ninety day period "while negotiations for a mutually agreeable contract are concluded;" that it was directly thereafter that petitioner closed down its plant.

In short, "No one could justifiably have thought the possibilities of bargaining had been more than temporarily exhausted" (Pet. 41) and there was no necessity for petitioner to resort to a lockout to protect its bargaining position. Accordingly, unlike the lockout in *Truck Drivers, supra,* the lockout here was not essential for the protection of any legitimate interest of the employer but served only to impair the employees' statutory rights.[4]

---

[4] Contrary to petitioner's contention (Pet. 13–17), there is no conflict among the courts of appeals. In three of the cases cited by petitioner, the employers who engaged in a lockout were members of multi-employer bargaining units and the respective courts of appeals held that the employers were justified in resorting to the lockout to protect the solidarity of the unit against "whipsawing" tactics on the part of the union. *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582, 204 F. 2d 529, 531 (C.A. 7); *Leonard* v. *National Labor Relations Board*, 197 F. 2d 435, 438–442, 205 F. 2d 355 (C.A. 9); *National Labor Relations Board* v. *Continental Baking Co.*, 221 F. 2d 427 (C.A. 8). The propriety of a lockout in these circumstances was subsequently upheld by this Court in *Truck Drivers, supra.* This, of course, is not the situation here. In the fourth case cited by petitioner, *American Brake Shoe Co.* v. *National Labor Relations Board*, 244 F. 2d 489 (C.A. 7), the court held that the circumstances were such that the employer, unlike petitioner here, could reasonably conclude that a strike was imminent which would adversely affect the employer's customer relations, and hence the lockout was a permissible defensive weapon.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth at pp. 3–5 of the petition, are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

U.S. GOVERNMENT PRINTING OFFICE 1959